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No. 83-1061

In the Supreme Court of the United States

OCTOBER TERM, 1983

CATALYTIC, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. In August 1980, respondent International Brotherhood of Electrical Workers, Local Union 136, began a strike against petitioner, following unsuccessful negotiations for a collective bargaining agreement. On August 30, striking employee Samuel Thrash telephoned the home of Sanford Simon, an employee who was continuing to work during the strike (Pet. App. A17-A18). Simon's wife answered the telephone and Thrash, without identifying himself, called her a "God damned bitch" and hung up (Pet. App, A18-A19 & n.2). The call was traced to Thrash and he was arrested on September 9 for making a harassing communication (Pet. App. A19).[1] He pleaded guilty and was

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[1]Simon, having received several harassing telephone calls, had a tracer put on his line prior to Thrash's call (Pet. App. A19).

fined $110. Thash was discharged by petitioner on September 11 for his alleged misconduct in making the phone call. The strike ended on September 17, 1980, and all but he and one other striking employee were reinstated.[2]

2. The Board, adopting the findings of the administrative law judge, concluded that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by refusing to reinstate Thrash at the conclusion of the strike. The Board found that Thrash's behavior during the strike "did not rise to the level of misconduct so violent or serious as to render him unfit for further service" (Pet. App. A10 n.2). The Board noted that Thrash's misconduct "was limited to a single, brief, anonymous telephone call which, while profane and vulgar, contained no threats of any kind and * * * was not violent in character" (*ibid.*). In addition, the Board found that Thrash's call was not "related to or part of any plan of harassment directed at non-striking employees" (*ibid.*).[3] The Board ordered that Thrash be offered reinstatement (Pet. App. A28). The court of appeals enforced the Board's order in an unpublished per curiam decision (Pet. App. A8).

3. Petitioner contends (Pet. 7) that the Board and the court of appeals erred by failing to apply to the strike misconduct at issue here the *McQuaide* standard adopted by the First and Third Circuits, *i.e.*, " 'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the

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[2]In addition to Thrash, one other striker, Phillip Lang, was suspended and later discharged for alleged misconduct during the strike (Pet. App. A18). The issue of his discharge is not before this Court (Pet. 5 n.3).

[3]Although there was evidence that Simon had received other harassing calls during the strike (see note 1; *supra*), the Board found that there was no basis for concluding that Thrash was responsible for, or even aware of, any other calls (Pet. App. A10 n.2).

exercise of rights protected under the Act.' " *NLRB* v. *W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977) (quoting *Local 542, International Union of Operating Engineers* v. *NLRB*, 328 F.2d 850, 852-853 (3d Cir.), cert. denied, 379 U.S. 826 (1964)); *Associated Grocers of New England* v. *NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977). At the time the petition in this case was filed, the question whether *McQuaide* was the appropriate legal standard for assessing strike misconduct was before this Court in *Woodkraft Division/Georgia Kraft Co.* v. *NLRB*, cert. granted, No. 83-103 (Nov. 14, 1983), vacated and remanded (Mar. 26, 1984). However, on February 22, 1984, the Board issued a supplemental decision in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. No. 173, in which it expressly adopted the *McQuaide* standard for determining whether statements by strikers to nonstriking employees justify an employer's refusal to reinstate. The Board stated that, in accordance with its usual practice, it would apply the *McQuaide* standard "to all pending cases in whatever stage" (268 N.L.R.B. No. 173, at 8 n.14). On March 26, 1984, this Court granted the motion of the Solicitor General, on behalf of the Board, to vacate the judgment of the court of appeals in *Georgia Kraft* and to remand the case to the Board for reconsideration in light of *Clear Pine Mouldings*.

Because the Board has adopted for this and future cases the *McQuaide* standard, which petitioner contends is the proper one, this case, like *Georgia Kraft*, no longer presents a legal issue warranting resolution by this Court. The only issue that remains is the application of the *McQuaide* standard to the facts of this case. That is a task which should be performed by the Board in the first instance. See *Woodkraft Division/Georgia Kraft Co.* v. *NLRB*, *supra*; *Bachrodt Chevrolet Co.* v. *NLRB*, 411 U.S. 912 (1973); *FTC* v. *Sperry & Hutchinson Co.* 405 U.S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Accordingly, we believe the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals insofar as it pertains to Samuel Thrash, and remand the case to the court of appeals with directions to remand it to the Board for reconsideration in light of *Clear Pine Mouldings Inc.*, 268 NLRB No. 173 (Feb. 22, 1984).

Respectfully submitted.

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